IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Sonveer @ Somveer & Another Vs. State of Rajasthan
(D.B. CRIMINAL APPEAL NO.1399/2003)

D.B. Criminal Appeal under Sec.374(2) Cr.P.C. against the judgment dated 5-9-2003 in Sessions Case No.67/2003 passed by Sh. Iduddin, RHJS, Additional Sessions Judge (Fast Track) No.1 Bharatpur Camp Deeg.

Date of Judgment: January 10, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. Biri Singh Sinsinwar] for the appellants.
Mr. Kamlendra Sihag]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT:(PER HON'BLE Shiv Kumar Sharma,J.)

Challenge in this appeal is to the judgment dated September 5, 2003 of the learned Additional Sessions Judge (Fast Track) No.1 Bharatpur Camp Deeg whereby the accused appellants Sonveer @ Somveer and Jagdish @ Jaggi were convicted and sentenced as under:-

U/s.302/149 IPC:

Each to suffer life imprisonment and fine of Rs.1000/-, in default to further suffer one month simple imprisonment.

U/s.364 IPC:

Each to suffer rigorous imprisonment for ten years and fine of Rs.1000/-, in default to further suffer one month simple imprisonment.

U/s.148 IPC:

Each to suffer rigorous imprisonment three years and fine of Rs.500/-, in default to further suffer fifteen days simple imprisonment.

U/s.201 IPC:

Each to suffer rigorous imprisonment for five years and fine of Rs.500/-, in default to further suffer fifteen days simple imprisonment.

Sentences were ordered to run concurrently.

2. The brief facts as unraveled by the prosecution at the trial are as follows:-

On June 6, 2000 the informant Virendra Pal (Pw.5) submitted a written report (Ex.P-8) at police station Deeg, stating therein that on the said day around 8.30 AM his cousin Pappu @ Bucha @ Prem Singh, Yad Ram and Naresh had gone to put up their appearance in a case pending in the court of Additional Sessions Judge Deeg when they reached to the court premises they found Inder, Somveer, Loka, one relative of Inder and 4-5 others were standing there. On seeing Pappu, Inder, Somveer and Loka took out revolvers and Katta and over powered Pappu. They forcefully took Pappu with them saying that they will murder him. On that report a case under sections 364, 147, 148 and 149 IPC was registered and investigation commenced. In the course of investigation dead body of Pappu got recovered from a well abd Section 302 IPC was added. Post mortem on the dead body was performed, necessary memos were drawn, statement of witnesses were recorded, the accused were arrested. Since age of the accused Kishanveer was 15 years, he was charge sheeted in the Children Court. Investigation against Hari Kishan was kept pending under section 173(8) CrPC. Charge sheet was filed against accused Inder, Jagdish @ Jaggi,

Somveer and Loka. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) No.1 Bharatpur Camp Deeg. On March 22, 2002 accused Inder did not appear and he was declared absconder. Charges under sections 148, 364, 149, 302 and 201 IPC were framed against Jaggi @ Jagdish, Somveer and Loka. The accused denied the charges and claimed trial. On February 20, 2003 accused Loka was granted interim bail but after his release he did not surrender and was declared absconder. In support of its case the prosecution examined as many as 31 witnesses. In the explanation under section 313 Cr.P.C., the accused claimed innocence. Five witnesses in defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the accused as indicated herein above.

3. Having scanned the material on record we find that the death of Pappu @ Bucha @ Prem Singh was homicidal in nature. As per postmortem report (Ex.P-12) following ante mortem injuries were found on his dead body:-

1. Abrasion 3cm x 1½cm over lower lip.
2. Incised wound 3cm x ¾cm x muscle deep over left angle of mandible spindle shape margin clean cut smooth and regular.
3. Incised wound 12cm x 3½cm x muscle deep below the angle of left mandible extending towards Rt.side of neck transversly wound is spindle shape margins clean cut regular & smooth.
4. Incised wound 8cm x 3½cm x upto posterior wall of trachea at the level of cricoid cartilage extending on more on Rt.side involving Rt.sternomastoid muscle and carotid artry of Rt.side This injury is extending from medial border of left sternomastoid to right side extending upto lateral border of Rt.sternomastoid muscle wounds margin clean regular smoot spindle shape near to it left side there is hematoma 4cm x 3cm over left clavicular fossa
5. Bruises:

(i) 4cm x 1cm over upper medial border of Rt. scapula
(ii) 2cm x 1cm over mid of Rt. scapula
(iii) 4cm x 3½cm lower end of Rt. scapula

Dr. S.P.Sharma (Pw.30) who conducted autopsy as a member of Medical Board deposed that the cause of death was hemorrhagic shock as a result of injuries to right carotid artery and trachea by sharp object.

4. In assailing the impugned judgment learned counsel for the accused urged following points:-

(i) Incident alleged to have taken place at 8.30 AM outside the court and in front of the house of CO but written report was submitted at 12.00 hour and the delay has not been explained properly.

(ii) Jagdish Prasad Yadav (Pw.13) was a practicing Advocate and the cousin of the deceased. He stated that he tried to rescue the deceased but he did not lodge the report immediately. These facts show that the incident has not taken place as has been alleged and the so-called eye witnesses are not actual eye witnesses.

(iii) Name of Jaggi @ Jagdish did not find place in the FIR, but the learned trial court failed to consider this aspect of the case.

(iv) It has come on record that the place of incident as well as the place from where dead body of deceased was recovered had already come to the knowledge of Investigating Agency before the arrest of accused, as such the information under section 27 of Evidence Act has not sanctity.

(v) Whole case hinges on the evidence of Jagdish and Pawan,

who are cousin brother and nephew of deceased, while other witnesses viz. Narendra, Brajendra and Rajesh Sharma have been declared hostile.

(vi) The site plan was prepared of the ground floor while the court where the accused and deceased came was on the first floor, this fact was not considered by the trial court.

(vii) The jeep (used for taking deceased) was driven by Bhagwat Singh (Pw.17) was declared hostile, thus there was no evidence on record to connect the accused with the crime.

(viii) The prosecution witnesses gave different statements as regards the presence of appellants at the time of incident. Some witnesses state that the accused were outside the gate of the court while other witnesses stated that accused took the deceased forcibly from the court premises.

(ix) There is no eye witness of incident of taking deceased in jeep or of murdering him and of throwing him in the well and the case rests on circumstantial evidence. Therefore the conviction of appellants is bad in eye of law.

(x) The prosecution failed to prove any motive of appellants for murdering the deceased. There were many cases pending against deceased Pappu of various offences including that of sections 302, 307, 364 and 395 IPC, therefore it cannot be said that only the appellants committed his murder.

(xi) The finding of trial court is based on surmises and conjectures, therefore the same liable to be set aside.

5. Per contra, learned Public Prosecutor supported the impugned

judgment and urged that the prosecution has established beyond reasonable doubt that the appellants were guilty. The alleged infirmities pointed out by the learned counsel for the appellants do not go to the root of the case.

6. We have pondered over the rival submissions and scanned the material available on record.

7. Coming to the prosecution evidence we notice that Jagdish (Pw.13) in his deposition stated that on June 6, 2000 around 8, 8.30 AM while he was in the court and Pappu, @ Prem Singh @ Bucha, Bobby @ Virendra Singh, Pawan, Brijendra and Yadram also came to court to appear in a case, Loko @ Lokendra, Inder, Somveer, Jaggi and Kishanveer and 4-5 others came armed with country made guns and forcefully took Pappu with them in jeep RJ 14C 2552. Thereafter on June 8, 2000 dead body of Pappu was found in the well of Mohan Mali. Testimony of Jagdish gets corroboration from the statements of Pawan (Pw.15) and Virendra Pal (Pw.5) and despite searching cross examination their evidence could not be shattered.

8. But at the same time this fact cannot be ignored that in the written report as well as in the statement under section 161 CrPC informant Virendra Pal (Pw.5) who has been examined as the eye witness of the prosecution did not name Jagdish @ Jaggi and he has been introduced for the first time at the trial. The prosecution could not satisfactorily explain as to why Jagdish @ Jaggi was not named in the FIR. Presence of Jagdish @ Jaggi at the time of occurrence thus becomes doubtful and possibility of over implication of appellant Jagdish @ Jaggi cannot be ruled out.

9. So far participation of appellant Sonveer is concerned, it is established beyond reasonable doubt that he along with other accused came armed with country made gun and forcibly took Pappu in a jeep. While abducting Pappu he uttered that he wanted to kill Pappu. Although he raised plea of alibi and examined defence witnesses to support this plea, we find this plea is afterthought and untrue. Jagdish (Pw.13), Pawan (Pw.15) and Virendra Pal (Pw.5) have established the presence of Sonveer at the time of incident. It was Sonveer, Loko, Inder and Kishanveer who came armed with Kattas (country made guns) to the court premises and forcibly took Pappu with them saying that they will murder him. In such a situation it was incumbent on Sonveer to give explanation as to what happened to Pappu after he was abducted. An accused is always entitled to hold his tongue, but if he is in a position to explain the only alternative theory to his guilt, the absence of explanation must be taken into account. Since Pappu was found murdered within 48 hours of his abduction, the circumstances impose an obligation on Sanveer to explain as to what happened to Pappu during the period of his abduction and his death. Vivan Bose J. in Shambhu Nath Mehra Vs. State of Ajmer (1956 SCR 199) lays down the legal principle underlying the shifting of burden of proof under section 106 of the Evidence Act thus:- (Para 38)

> "This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are `especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.
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> The word especially stress that, it means facts that are pre-eminently or exceptionally within his knowledge."

10. In considering the prosecution evidence in the light of proximity of time within which Pappu was abducted and the proximity of place within which the dead body was found, it is enough to draw an inference that Pappu's death was caused by Sonveer and other accused who accompanied him and participated in abduction. Interpreting Section 106 of the Evidence Act, their Lordships of the Supreme Court in State of West Bangal Vs. Mir Mohammad Omar (2000)8 SCC 382, indicated thus:- (Para 31)

> "The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty."

It was further indicated thus:- (Para 33)

> "Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc., in relation to the facts of the case."

11. Since appellant Sonveer and other accused were abductors of Pappu and they failed to offer any explanation as to what transpired after Pappu had been abducted (the facts that were especially within their knowledge) it will be justified to draw an inference that Sonveer and his other companions had murdered Pappu after his abduction. The facts of Murlidhar Vs. State of Rajasthan 2005 RCC (SC) 476 are distinguishable. In that case the prosecution did not proceed on the footing that the facts were especially within the knowledge of accused and therefore the principle laid down in Section 106 of Evidence Act was not found applicable. But in the instant case the prosecution has established that facts are pre-eminently within the knowledge of appellant Sonveer and his other companions that what they did with Pappu after his abduction. As already noticed Sonveer and his companions at the time of abduction expressed their intention to kill Pappu and Pappu was found dead within 48 hours of his abduction it will be justified to draw inference that it is appellant Sonveer and his companions who committed murder of Pappu. We thus find no infirmity in the findings of learned trial Judge so far it relates to appellant Sonveer @ Somveer.

12. For these reasons, we dispose of instant appeal in the following terms:-

(i) Appeal preferred by Sonveer @ Somveer stands dismissed and his conviction and sentence under sections 302/149, 148, 364 and 201 IPC are confirmed.

(ii) Appeal of appellant Jagdish @ Jaggi stands allowed and he is acquitted of the charges under sections 302/149, 148, 364 and 201

IPC. Appellant Jagdish @ Jaggi, who is in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

(iii)The impugned judgment of learned trial court stands modified as indicated above.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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